LIM ENG YEW

v.

UNITED ORIENTAL ASSURANCE SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
AJAIB SINGH J
[CIVIL SUIT NO. P 395 OF 1980]
13 JANUARY 1989

TORT: *Negligence - Plaintiff obtained judgment against authorized driver of motor vehicle - Accident occurred whilst plaintiff was being carried as a passenger in motor lorry pursuant to a contract of employment between plaintiff and owner of vehicle - Motor lorry driven by employee of owner of vehicle - Whether Insurance company liable to indemnify claims - Commercial Vehicle Insurance Policy issued to owner of vehicle.*

INSURANCE: *Commercial vehicle insurance policy - Insurance company deny plaintiff was being carried as a passenger in pursuance of a contract of employment - Exception clause relied on by Insurance company - Whether plaintiff in the employment of driver or owner of vehicle at material time.*

On 7 June 1977 the plaintiff sued the authorised driver of motor lorry No. AL 1577 for negligence for the injuries suffered arising out of a motor accident on 26 June 1972. At the time of the accident, the plaintiff was being carried as a passenger in the said motor lorry pursuant to a contract of employment between him and the owner of the vehicle. On 15 June 1978, the plaintiff obtained judgment for damages arising out of the said accident against the driver in the sum of RM120,000 as general and special damages with interest and costs agreed at RM3,000.

The plaintiff filed recovery proceedings against the defendants, the insurers of the said motor-vehicle pursuant to s. 80(1) of the Road Traffic Ordinance 1958 to enforce the judgment against the driver of the said motor-lorry. The defendants, the insurance company in their amended statement of defence admitted that at the material time, the policy was in force but deny that the plaintiff was being carried as a passenger in pursuance of a contract of employment. The defendants further aver that in the event the plaintiff was a passenger which was denied, the defendants would rely on exception (ii) of the exceptions to s. II in the policy. Further and in the alternative, the defendants aver that the plaintiff did not comply with s. 80(2) of the Road Traffic Ordinance in that he failed to give notice to them within the time stipulated.

Held:
The plaintiff must succeed in this case and the Court gave judgment for the plaintiff against the defendants with costs.

[Judgment for plaintiff with costs.]

Cases referred to:
Chan Kum Fook v. The Welfare Insurance Co. [1975] 2 MLJ 184
China Insurance Co. Ltd. v. Teh Lam Lee [1977] 1 MLJ 1
Richards v. Cox [1942] 2 All ER 624

Legislation referred to:
Road Traffic Ordinance 1958, s. 80(1), (2)

For the plaintiff - Wong Soon For; M/s. Chooi & Co.
For the defendants - Radhakrishnan; M/s. Shearn Delamore & Co.

JUDGMENT

Ajaib Singh J:

The plaintiff in this case sued the defendants pursuant to s. 80(1) of the Road Traffic Ordinance 1958. On 26 June 1972 the plaintiff suffered injuries arising out of a motor accident caused by the negligence of the driver of motor lorry No. AL 1577. At the time of the accident the plaintiff was being carried as a passenger in the motor lorry pursuant to a contract of employment between him and the owner of the vehicle one Lim Yoke Pak. The defendants had issued a Commercial Vehicle Insurance Policy effective from 1 May 1972 to 30 April 1973 to Lim Yoke Pak whereby the defendants agreed to indemnify the said Lim Yoke Pak against all sums which the said Lim Yoke Pak or any authorised driver might be liable to pay as damages or compensation in respect of death of or bodily injury to any person cause by or arising out of the use of the vehicle including costs.

On 7 June 1977 the plaintiff sued Lim See Keong the authorised driver of the vehicle at the time of the accident. On 15 June 1978 the plaintiff obtained judgment for damages arising out of the motor accident against Lim See Keong in the sum of RM120,000 being general and special damages with interest and costs. Costs were subsequently agreed at RM3,000 in lieu of taxation.

In their amended defence the defendants admit that at the relevant time the policy was in force but deny that the plaintiff was being carried as a passenger in pursuance of a contract of employment. The defendants further aver that in the event the plaintiff was a passenger, which was denied, the defendants would rely on Exception (ii) of the Exceptions to s. II in the policy which states as follows:

> The company shall not be liable in respect of death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment.

Further and in the alternative the defendants aver that the plaintiff did not comply with s. 80(2) of the Road Traffic Ordinance in that he failed to give notice to them within the time stipulated. In the circumstances the defendants aver that they are not liable to pay any sum to the plaintiff.

In the course of the trial the defendants did not pursue their averment that the plaintiff was not being carried as a passenger in the motor-lorry in pursuance of a contract of employment. In fact to take advantage of exception (ii) in the exceptions to s. II the defendants relied strongly on the fact that the plaintiff was such a passenger. The defendants did not also pursue their allegation that the plaintiff had failed to comply with s. 80(2) of the Road Traffic Ordinance.

I am of the view that the plaintiff must succeed in this case. In s. II - Liability to Third Party - it is provided *inter alia* that:

> 1. The company will subject to the Limits of Liability indemnify the insured in the event of accident caused by or arising out of the use of the Motor Vehicle or in connection with the loading or unloading of the Motor Vehicle against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of:
>
> (a) death or bodily injury to any person
>
> (b) damage to property

2. In terms of and subject to the limitations of and for the purposes of this Section the company will indemnify any authorised driver who is driving the Motor Vehicle provided that such authorised driver:

(i) shall as though he were the insured observe fulfill and be subject to the terms of the Policy insofar as they can apply

(ii) is not entitled to indemnity under any other policy.

Under the exceptions to s. II it is provided *inter alia* that:

The company shall not be liable in respect of

(i) death bodily injury or damages caused or arising beyond the limits of any carriageway or thoroughfare in connection with the bringing of the load to the Motor Vehicle for loading thereon or the taking away of the load from the Motor Vehicle after unloading therefrom.

(ii) death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment.

(iii) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or emerging or getting on to or alighting from the Motor Vehicle at the time of occurrence of the event out of which any claim arises.

It will be seen from the above provisions in the policy that under para. 2 of s. II - Liability to Third Party - an authorised driver would be indemnified by the insurers as though he was the insured. This means that Lim Swee Keong the authorised driver in this case was separately covered under the terms of the policy - and the plaintiff was certainly not a person in the employment of Lim Swee Keong as envisaged under exception (ii) in the exceptions to s. II.

Secondly - exception (iii) in the exceptions to s. II made the defendants liable because the plaintiff was "a passenger carried by reason of and in pursuance of a contract of employment."

In support of my conclusions above the Singapore cases of *Chan Kum Fook v. The Welfare Insurance Co.* [1975] 2 MLJ 184 and *China Insurance Co. Ltd. v. Teh Lam Lee* [1977] 1 MLJ 1 are in point. (See also the Case of *Richards v. Cox.* [1942] 2 All ER 624.

In the event therefore I gave judgment for the plaintiff in his claim against the defendants with costs.

Also found at [1989] 1 CLJ 794